STATE OF MICHIGAN

IN THE SUPREME COURT

SCOTT M. CAIN,

Plaintiff-Appellee,

v

WASTE MANAGEMENT, INC. and TRANSPORTATION INSURANCE COMPANY,

Defendant-Appellant,

and

SECOND INJURY FUND (TOTAL AND PERMANENT DISABILITY PROVISIONS),

Defendant-Appellant.
_____/

Docket No. 125111

Court of Appeals No. 242104
(Consolidated with No. 242123)

Lower Court No. WCAC 98-0390

ORAL ARGUMENT REQUESTED

PLAINTIFF-APPELLEE SCOTT CAIN'S BRIEF IN OPPOSITION TO APPEAL OF DEFENDANT-APPELLANTS WASTE MANAGEMENT AND TRANSPORTATION INSURANCE COMPANY

Edward M. Smith (P20646)
Pamela K. Bratt (P45728)
PINSKY, SMITH, FAYETTE & HULSWIT, LLP
Attorneys for Plaintiff-Appellee, Scott Cain
146 Monroe Center, N.W., Suite 1515
Grand Rapids, MI 49503
(616) 451-8496

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Defendant-Appellant Waste Management says "no".

Defendant-Appellant Second Injury Fund says "no".

Plaintiff-Appellee Scott Cain says "yes".

The WCAC says "yes".

The Court of Appeals says "yes".

WHETHER PIPE V LEESE TOOL & DIE SHOULD BE UPHELD?

Defendant-Appellant Waste Management says "no".

Defendant-Appellant Second Injury Fund says "no".

Plaintiff-Appellee Scott Cain says "yes".

The WCAC did not answer this question.

The Court of Appeals upheld Pipe but did not answer this question..

WHETHER THE COURT OF APPEALS CORRECTLY UPHELD THE WCAC ON REMAND, WHICH HELD THAT CAIN HAD SUSTAINED THE SPECIFIC LOSS OF HIS REMAINING LEG AND THEREFORE WAS ENTITLED TO T & P BENEFITS?

Defendant-Appellant Waste Management says "no".

Defendant-Appellant Second Injury Fund says "no".

Plaintiff-Appellee Scott Cain says "yes".

The WCAC says "yes".

The Court of Appeals says "yes".

WHETHER THIS COURT SHOULD REVERSE ITS PRIOR HOLDING THAT WAGE EARNING CAPACITY AND CORRECTIVE DEVICES MAY BE CONSIDERED IN T & P CLAIMS FOR THE LOSS OF INDUSTRIAL USE OF TWO MEMBERS?

Defendant-Appellant Waste Management says "no".

Defendant-Appellant Second Injury Fund says "no".

Plaintiff-Appellee Scott Cain says "yes".

The WCAC did not answer this question because it awarded benefits under a different provision.

The Court of Appeals did not answer this question.

COUNTER STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

I. NATURE OF ACTION.

This action is the most recent appeal in a long appellate history of an administrative application filed in 1992 by Scott Cain in which he requested benefits under the Workers' Disability Compensation Act.

II. CHARACTER OF PLEADINGS AND PROCEEDINGS.

Defendant-Appellant Waste Management appeals the decision of the Court of Appeals Cain v. Waste Management, Inc. and Second Injury Fund (Total and Permanent Disability Provisions), dated November 6, 2003. (Included in Appendix of Waste Management at p.62a). This decision upheld the decision of Worker's Compensation Appellate Commission ("WCAC") mailed May 24, 2002, Cain v Waste Management, Inc. and Second Injury Fund (Total and Permanent Disability Provisions), 2002 ACO #130. (Included in Appendix of Waste Management at p. 27a). The WCAC issued its opinion on remand from the Michigan Supreme Court in Cain v Waste Management, 465 Mich 509 (2002).

The underlying facts as stated by the Supreme Court are:

> "Plaintiff Scott M. Cain worked as a truck driver and trash collector for defendant, Waste Management, Inc. In October 1922, as he was standing behind his vehicle emptying a rubbish container, he was struck by an automobile that crashed into the back of the truck. Mr. Cain's legs were crushed. Physicians amputated Mr. Cain's right leg above the knee. His left leg was saved with extensive surgery and bracing.
>
> "In February 1990, Mr. Cain was fitted with a right leg prosthesis, and he was able to begin walking. He returned to his employment at Waste Management and started performing clerical duties.
>
> "Mr. Cain's left leg continued to deteriorate. In October 1990, he suffered a distal tibia fracture. Doctors diagnosed it as a stress fracture caused by

> preexisting weakness form the injury sustained in the accident. After extensive physical therapy and further surgery on his left knee, Mr. Cain was able to return to Waste Management in August 1991, first working as a dispatcher and then in the sales department.
>
> "Waste Management voluntarily paid Mr. Cain 215 weeks of worker's compensation benefits for the specific loss of his right leg. MCL 418.361(2(k). However, there was disagreement concerning whether he was entitled to additional benefits." Cain v Waste Management, Inc, 465 Mich 509, 513; 638 NW2d 98 (2002).

The Supreme Court also recounted the procedural history of the case, summarized as follows:

Plaintiff filed a petition with the Bureau of Worker's Disability Compensation seeking total and permanent disability benefits for the injuries to his legs. Cain, *supra* at 514. At the hearing on that claim plaintiff moved to amend his petition to expressly include a claim for specific loss of his left leg, a motion that was denied. Id. Plaintiff then filed a separate petition requesting benefits for the specific loss of the left leg. Id.

The trial Magistrate awarded plaintiff specific loss benefits for both of his legs to be paid consecutively. Id. The Magistrate reasoned that, although he had denied plaintiff's motion to add a claim for specific loss of the left leg, plaintiff's original claim for "loss of industrial use of both legs implicitly included a claim for specific loss of the left leg." Id.

After finding the specific loss of both legs, the Magistrate also found that plaintiff had lost the industrial use of both legs and, therefore, the "Fund would be obligated to pay benefits for total and permanent disability". Id. at 515.

The Second Injury Fund (Total and Permanent Disability Provisions) and Defendant Waste Management and Transportation Insurance Company appealed to the Workers' Compensation Appellate Commission. The Commission held that the Magistrate erred in

awarding benefits for the specific loss of the left leg in light of the phrasing of plaintiff's initial petition to the Bureau. The Commission also held that the Magistrate legally erred in his analysis of the total and permanent disability claim. Id. On this point, the Commission held that in determining whether plaintiff was totally and permanently disabled the Magistrate was to use a "corrected" standard to examine the remaining usefulness of plaintiff's "*braced* leg", rather than evaluating the usefulness of the leg without the brace. Id.

Plaintiff appealed to the Court of Appeals and leave was granted. First, the Court of Appeals affirmed the Commission's denial of specific loss benefits for the left leg on the basis that plaintiff had not stated a claim for such benefits. Cain, 465 Mich at 515.

Second, the Court of Appeals reversed and vacated with respect to the finding of total and permanent disability benefits. Id. at 515-516. The Court of Appeals reasoned that an "uncorrected"test is the proper criterion for resolving the total and permanent disability question whether plaintiff lost the industrial use of his legs. Id. at 516. The Court of Appeals remanded with instructions that the Commission apply the uncorrected test and make the requisite factual determination. Id.

Not awaiting the remand, the Second Injury Fund and Defendant Waste Management applied to the Supreme Court for leave to appeal, which was granted and produced the Supreme Court's opinion referred to above. The Supreme Court reversed in part the Court of Appeals' judgment.

The Supreme Court held that a corrected test is to be used to determine total and permanent disability whereas an uncorrected test is only proper for determining specific loss. Id. at 518, 522-524. However, the Supreme Court was careful to limit its holding on

the corrected test to claims for total and permanent disability under MCL §418.361(3), subsection (g) (loss of industrial use of two members). Cain, 465 Mich at 512, 517, 519, 524 including fn 2, 10, 13.

The Supreme Court in a footnote added with respect to plaintiff's specific loss of the left leg claim that, "[w]hile this claim may not have been pleaded as specifically as it should have been, we discern no prejudice or surprise. Accordingly, we remand this claim to the WCAC for resolution." Id. at 510 n 1.[1] The Supreme Court concluded its opinion saying: "We remand to the WCAC to consider plaintiff's specific loss claim." Id. at 524.

On remand, the Commission decided that Cain had sustained the specific loss of his left leg. The Commission also held that: "Having shown specific loss of each leg, plaintiff is entitled to total and permanent disability benefits." (WCAC Opinion dated 5-24-02, p 7, Appendix of Waste Management, p 33a)."

Both the Second Injury Fund and Defendant Waste Management applied to the Court of Appeals for leave to appeal, and on September 6, 2002, the Court granted both applications. The Court of Appeals held that a specific loss can be shown using a "loss of industrial use" standard. (Court of Appeals decision dated 11-6-03, p 2, 7, Appendix of Waste Management, pp 63a, 68a). The court reasoned that Pipe v Leese Tool & Die Co., 410 Mich 510 (1981) is still good law, and upholds "loss of industrial use" as a test for specific losses. (Id.). The Court of Appeals noted that this Court reiterated that specific losses must be determined with the injured member in an uncorrected condition. (Id., p

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[1] There were also additional issues upon which leave was granted, but the Supreme Court "vacated the order granting leave to appeal regarding all other issues" then these. Cain, supra, at 510-511 n 1.

68a).

Defendants Second Injury Fund and Waste Management requested leave to appeal from this Court. This Court granted leave in both cases. Plaintiff Scott Cain now responds to the appeal of Defendant Waste Management and Transportation Insurance Company.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY HELD THAT THE "LOSS OF INDUSTRIAL USE" STANDARD MAY BE APPLIED TO CLAIMS OF SPECIFIC LOSS UNDER MCL § 418.361(2), FURTHER, PIPE SHOULD NOT BE OVERRULED.

At the outset, Plaintiff-Appellee Scott Cain notes that this Court's prior decision created internal inconsistencies in the interpretation of the Workers Disability Compensation Act (the "Act"). In fact, all the parties agree the result is unworkable. The implications of this Court's prior decision reach beyond the immediate subsections of the Act this Court discussed and considered. It is crucial that in this second opportunity, a workable decision results, and this will require careful consideration of the context and implications of any decision.

Under the Workers Disability Compensation Act, the courts may review questions of law under a de novo standard of review. MCL § 418.861a(14); DiBenedetto v West Shore Hospital, 461 Mich 394, 401 (2000). On remand from this Court the WCAC held that Cain had sustained the specific loss of his remaining leg because it is industrially useless without a brace. Defendant Waste Management does not appeal the conclusion that Cain has lost the industrial use of his remaining leg when it is evaluated without the benefit of braces or prosthetics.

Defendant-Appellant Waste Management argues the WCAC used the wrong legal test and that the Court of Appeals repeated the error when it upheld the WCAC. Defendant-Appellant Waste Management claims that specific loss can only be shown by physical loss or amputation or its equivalent, and not by loss of industrial use. In the alternative, if loss of industrial use is the correct standard, Defendant Waste Management

argues the standard should be applied when the limb or member is in its corrected condition. Both arguments must fail.

Waste Management makes these arguments by two methods. First, it assumes its own conclusion that the "plain language" of the statute support its argument. Second, it urges the reversal of decades of precedent in several areas of the Act in order to make this Court's prior decision workable. Cain will deal with these arguments below. Waste Management also adopted various arguments made by Defendant-Appellant Second Injury Fund, but Cain will respond to these arguments in his brief opposing the appeal of the Second Injury Fund, since these arguments were outside the scope of Waste Management's application for leave to appeal.

A The Act Does Not Define the Statutory Term "Loss".

MCL § 418.361 of the Worker's Disability Compensation Act is the first statutory section disputed here. This section is often referred to as the scheduled loss section because it sets forth a schedule of benefits to be received for certain enumerated losses.

For example, MCL § 418.361(2) allows workers to collect benefits for the loss of a single body member, such as a hand or foot (also called "specific" losses). Under MCL § 418.361(3), if a worker has suffered the loss of two members, as set forth in a schedule in the statute, the worker is conclusively presumed to be totally and permanently disabled for 800 weeks and collects benefits for total and permanent disability ("T & P" benefits) during this time. The two losses don't have to occur at the same time. See, MCL § 418.521(1). Therefore, using the example of legs, a worker can be eligible for T & P disability benefits by adding together claims for two single losses or by a single claim for the loss of industrial use of both legs.

MCL §418.361(2) states:

> "(2) In cases included in the following schedule, the disability in each case shall be considered to continue for the period specified, and the compensation paid for the personal injury shall be 80% of the after-tax average weekly wage subject to the maximum and minimum rates of compensation under this act for the loss of the following:
>
> . . . . (a) Thumb, 65 weeks.
> . . . . (b) First finger, 38 weeks.
> . . . . (c) Second finger, 33 weeks.
> . . . . (d) Third finger, 22 weeks.
> . . . . (e) Fourth finger, 16 weeks.
>
> The loss of the first phalange of the thumb, or of any finger, shall be considered to be equal to the loss of ½ of that thumb or finger, and compensation shall be ½ of the amount above specified.
>
> The loss of more than 1 phalange shall be considered as the loss of the entire finger or thumb. The amount received for more than 1 finger shall not exceed the amount provided in this schedule for the loss of a hand.
>
> (f) Great toe, 33 weeks.
> (g) A toe other than the great toe, 11 weeks.
>
> The loss of the first phalange of any toe shall be considered to be equal to the loss of ½ of that toe, and compensation shall be ½ of the amount above specified.
>
> The loss of more than 1 phalange shall be considered as the loss of the entire toe.
>
> (h) Hand, 215 weeks.
> (I) Arm, 269 weeks.
>
> An amputation between the elbow and wrist is 6 or more inches below the elbow shall be considered a hand, and an amputation above that point shall be considered an arm.
>
> (j) Foot, 162 weeks.
> (k) leg, 215 weeks.

An amputation between the knee and foot 7 or more inches below the tibial table (plateau) shall be considered a foot, and an amputation above that point shall be considered a leg.

(l) Eye, 162 weeks.

Eighty percent loss of vision of 1 eye shall constitute the total loss of that eye."

However, the term "loss" in MCL §418.361(2) is not defined in the statute. Rench v Kalamazoo Stove & Furnace Co., 286 Mich 314, 318 (1938). The Rench Court made this holding after the Legislature clarified a problematic issue for the courts in 1927 by adding the specific measurements (contained in the current version of the statute cited above) determining where an amputation creates a loss of a lesser body part (e.g., hand or foot) versus the greater (e.g. arm or leg). See, 1927 PA 63. Thus the addition was an illustration, and not a limitation, on the definition of the term "loss". See, Rench, at 318.

B Standard Definitions of the Term "Loss" Do Not Support Defendant Waste Management's Position.

Merriam Webster's Collegiate Dictionary, 10th Edition, defines "loss":

"1: DESTRUCTION, RUIN".

Similarly, "lost" is defined:

"1: not made use of, won, or claimed" (Id.).

Black's Law Dictionary, Fifth Edition, offers this guidance using its approach of

distilling case law from around the country:

> "Loss is a generic and relative term. It signifies the act of losing or the thing lost; it is not a word of limited, hard and fast meaning and has been held synonymous with, or equivalent to, "damage", "damages", "deprivation", "detriment", "injury", and "privation"." (citations omitted).

Black's then breaks down the use of the word in various areas of the law:

> "*Disability Benefits.* State workers' compensation laws, social security, and disability insurance contracts provide disability benefits for ***partial or permanent loss of use of limbs, eyes, etc.***
>
> *Insurance.*
>
> * * * *
>
> "Loss of eye" means ***loss of use*** for any practical purpose .....***Loss of member or loss of an entire member means destruction of usefulness*** of member or entire member for purposes to which in its normal condition it is susceptible of application, in absence of more specific definition. ***Loss of use of hand means substantial and material impairment of use*** in practical performance of its function. ***Loss of use of member is equivalent to loss of member***. ....." (Id., emphasis added, citations omitted).

Accordingly, loss of use is a well-recognized, accepted definition of "loss". This is especially true when viewed in the comparable contexts of disability benefits and insurance. While Waste Management argues the "plain meaning" of the term "loss" is amputation or loss tantamount to amputation, standard dictionary definitions do not support this restrictive definition of "loss". Defendant-Appellant Second Injury Fund goes further and urges the "plain meaning" can only be amputation. Both Defendants are assuming their own conclusions to further their arguments.

C The Legislative History of MCL 418.361(2) Shows the Legislature Does Not Restrict Specific Loss Benefits to Cases of Amputation or Physical Loss Only and Includes Loss of Industrial Use.

A few early decisions by this Court held that specific loss benefits under the predecessor of MCL §418.361(2) would only be awarded upon the actual, total physical loss of the specified body member. Packer v Olds Motor Works, 195 Mich 497 (1917); Adomities v Royal Furniture Co., 196 Mich 498 (1917); Wilcox v Clarage Foundry & Manufacturing Co., 199 Mich 79 (1917).

Almost immediately after these first few decisions the Michigan Supreme Court interpreted "loss" to include substantial physical destruction less than amputation, where the primary service of the member was lost. Lovalo v Michigan Stamping Co., 202 Mich 85 (1918); West v Postum Co., Inc., 260 Mich 545 (1932). Similarly, this Court also held loss of industrial use with no amputation sufficient to find "loss" of a hand. Shumate v American Stamping Co., 357 Mich 689 (1959) (1953 injury date).

The courts may interpret ambiguous terms in statutes. Paschke v Retool Industries, 445 Mich 502 (1994). The Worker's Disability Compensation Act is remedial legislation that should be interpreted liberally in a humanitarian manner in favor of the injured employee. Wilmers v Gateway *(on rem)*, 227Mich App 339, 345 (1998) *lv denied*, 457 Mich 884, *rec denied*, 584 NW2d 921. (citations omitted). Literal constructions that produce unreasonable or unjust results that are inconsistent with the purpose of the act should be avoided. Id. (citations omitted).

Further, in 1954 and 1956 the legislature amended the scheduled loss provisions of MCL §418.361(2) and MCL §418.361(3). PA 1954, No. 175, section 10; PA 1956, No. 195. The legislature is presumed to know how the courts have interpreted the terms of a statute and if the legislature allows the terms to remain during revisions of the statute, the legislature is presumed to approve and adopt the courts' interpretations. Dean v Chrysler

Corp, 434 Mich 655, 664-667 (1990). However, the legislature did not amend the term "loss" in subsection (2) to exclude either destruction less than amputation or loss of industrial use.

Pipe v Leese Tool & Die, 410 Mich 510 (1981) has been the last word on this subject for 23 years. In Pipe, the Michigan Supreme Court held that courts who interpret the standard for specific loss benefits as requiring only anatomic loss or its equivalent are wrong. Id. at 526. The court specifically stated that specific loss can also be shown by loss of industrial use, as demonstrated by loss of the primary service of the injured body member in industry. Id. at 527. The Pipe court continued that the test it upheld was consistent with a long line of cases and not a new result. Id. at 519-527. Further, the court noted that its holding was consistent with "the test most universally applied in the other jurisdictions of this country". Id. at 527, citations omitted.

Thus, the legislative and judicial history of the provision further support the WCAC's award of benefits. The courts and legislature have allowed claims for specific loss in cases of physical injury less than amputation from almost the beginning of the Act. Second, the phrase "loss of industrial use" (including the companion phrase "loss of primary service") has been used to evaluate such claims for decades, with the blessing of the courts and legislature. It is wrong for Defendant-Appellant Waste Management to say that specific losses do not include "loss of industrial use." The phrase grew from infancy to adulthood in just such cases.

The Court of Appeals correctly noted this Court in Cain v Waste Management, Inc., 465 Mich 509 (2002), did not overrule Pipe. However, Defendant-Appellant Waste Management attempts to solve the problems created by this Court's decision by urging this

Court to overrule 87 years of case law, adopt the approach which is *not* most universally applied in the country, which is *not* supported by the assent of the legislature, and which is not consistent with the "plain meaning" of the terms used in the statute as defined by standard interpretive aids such as Merriam Webster's dictionary and Black's Law Dictionary (which bases its definition on an overview of caselaw throughout the country, both in disability law and the comparable area of insurance law). It appears Waste Management's "plain meaning" is not so plain after all. The Court of Appeals correctly upheld the WCAC's award of benefits using the "loss of industrial use" standard. Therefore, this Court should deny Defendant's appeal and decline any invitation to overrule Pipe.

D The Legislative and Judicial History of MCL 418.361(2) and (3) Shows the Legislature Does Not Permit Consideration of Corrective Devices in Loss of Industrial Use Claims.

Defendant-Appellant Waste Management's argument that the phrase "loss of industrial use" began in T&P provisions and has been improperly read into specific loss provisions is wrong. Instead, as shown above, the phrase began in specific loss cases and spread to T&P cases. During the 1956 amendments the legislature saw no need to fix what was not broken in the specific loss subsection, i.e., the legislature approved the court's interpretation of "loss" to include "loss of industrial use" as that phrase had been developed by the courts in specific loss cases under MCL § 418.361(2). The legislature liked the phrase so much it added it to the redrafted T&P provisions of 1956. PA 1956, No. 195.

As Dean requires, this also means that interpretations the courts gave the phrase "loss of industrial use" were also imported into the T&P provisions. See, Dean, 434 Mich at 664-667(1990). As this Court noted in Miller v Sullivan Milk Products, Inc., 385 Mich 659, 665 (1971) (emphasis added):

> "PA 1956, No 195, restored "loss of industrial use" as a measure of total and permanent disability by adding to the above six classifications the following: "(7) Permanent and total loss of industrial use of both legs or both hands or both arms or 1 leg and 1 arm; ****." Since this court had decided a number of cases in which the term "loss of industrial use" was used, even though not appearing in the Workmen's Compensation Act, we conclude that the legislature intended to restore this Court's decisions defining the "loss of industrial use" test to the workmen's compensation law by Act 195."

Thus, at the time of the 1954 and 1956 amendments, the legislature was presumed to know of Lentz v Mumy Well Service, 340 Mich 1 (1954), in which this Court upheld benefits for the loss of industrial use of the hand. The Court reviewed the evidence and found support for the worker's compensation commission's factual findings that without the use of the prosthetic device which the claimant wore, "which served to protect what remained of his hand and to improve the use of it by allowing him to grasp light objects between the thumb and the device", the claimant had lost the ordinary industrial use of the hand. Id. at 3-5. In other words, this Court did not consider prosthetic devices when evaluating a loss of industrial use claim.

Thus, when the legislature added loss of industrial use to the specifically enumerated eligibility provisions of the T&P section, the legislature must be taken to have specifically approved this Court's interpretation from Lentz which excluded prosthetic devices from the loss of industrial use analysis. Lentz arose in a specific loss claim for industrial use and by legislative incorporation applies to T&P claims for loss of industrial use. Therefore, prosthetics should not be considered in any loss of industrial use claims, much less in a specific loss claim. This Court reaffirmed in Cain, supra, that specific losses are not evaluated using corrective devices.

Therefore, this Court should reject Defendant's arguments. The WCAC used the

proper test for specific losses, i.e. whether Cain had lost the industrial use of his remaining leg when evaluated in its uncorrected condition. Because Cain has sustained the loss of each leg, the WCAC correctly held that he is entitled to T & P benefits under the terms of MCL 418.361(3). Subsection b provides, "Total and permanent disability, compensation for which is provided in § 351 means: . . . (b) Loss of both legs or both feet at or above the ankle". The Court of Appeals properly upheld the WCAC. This Court should deny Defendant-Appellant Waste Management's appeal.

II. THE COURT OF APPEALS PROPERLY UPHELD THE APPLICATION OF THE LEGAL TEST USED BY THE WCAC, WHICH HELD ON REMAND THAT CAIN SUSTAINED THE SPECIFIC LOSS OF HIS LEFT LEG BECAUSE THE LEFT LEG IS INDUSTRIALLY USELESS IN ITS UNCORRECTED CONDITION.

As Cain explained at the outset of this Brief, no party disputes that if the test for specific loss is "loss of industrial use" as measured without corrective devices, he wins (and the WCAC agrees because it awarded his benefits for this reason). However, Defendant-Appellant Waste Management states only that Cain still has a leg, he can wiggle his toes, flex his leg, and articulate his ankle. This evidence is inapposite to Defendant-Appellant Waste Management's claim. Defendant-Appellant Waste Management ignores the evidence cited by the WCAC that Cain cannot support himself without the brace, can't walk without the brace, can't sleep in the same bed with his wife unless he is wearing the brace, and uses a wheelchair at night and in the morning before he leaves the house. (WCAC decision dated 5-24-02, pp. 3-6, Appendix of Waste Management at pp 29a-32a). Thus, the Court of Appeals properly found support for the WCAC's conclusion that Cain has suffered the specific loss of his left leg because it is industrially useless in its uncorrected condition. Defendant-Appellant Waste Management ignores that every reviewing court or

administrative body considered this evidence also sufficient to show that Cain's loss was the equivalent of an amputation, even though this is not the correct test. Defendant Waste Management has only used this portion of its appeal to repeat its prior argument, that the test for specific loss should be made considering the injured member in its corrected condition. Therefore, Defendant-Appellant Waste Management's appeal should be denied.

III ELIGIBILITY FOR SCHEDULED LOSS BENEFITS DOES NOT REQUIRE PROOF OF IMPAIRMENT OF WAGE EARNING CAPACITY.

A The Legislature Made Consideration of Wage Earning Capacity Irrelevant Under the Scheduled Loss Provisions of MCL § 418.361(2) and (3).

MCL § 418.361(2) contains the presumption that workers who suffer the enumerated losses are disabled for the number of weeks specified in the statute. Consequently the amount of actual wages earned during the statutory period of disability for specific loss are irrelevant. Liesinger v Owen-Ames-Kimball Co., 377 Mich 159, 165, fn. 6 (1966). In other words, a worker with a specific loss shall receive the full benefits listed in the statute even though the worker may not have had any loss of wage earning capacity and may continue to work and even earn more than before the injury.

Prior to the 1956 Amendments of PA 1956, No 195, the T & P provisions, now MCL § 418.361(3), read:

> "The loss of both hands, or both arms, or both feet, or both legs, or both eyes, or of any 2 thereof, shall constitute total and permanent disability, to be compensated according to the provisions of section 9."

This Court explained in Clark v Chrysler Corp., 377 Mich 140, 144-146 (1966), that prior to the amendments not only did it interpret "loss" to include loss of industrial use, but it also interpreted this language to include other injuries which could be found as a matter of fact to be total and permanent disabilities, i.e., the statutory language was non-exclusive

and any other injury causing total and permanent disability as a matter of fact could be considered. However, the 1954 amendments changed the provision so that it set forth 6 specific categories of total and permanent disabilities, none of which were loss of industrial use. This Court interpreted this change to exclude any other category of total and permanent disability other than the listed provisions. Clark, at 145-146; Verberg v Simplicity Pattern Co., 357 Mich 636, 641-642 (1959). One consequence was that, "[b]y legislative enactment, which is controlling here, the question of total and permanent disability is not one of fact but whether plaintiff's injuries come within one of the enumerated losses set forth in the statute." Hier v Boichot Concrete Products Corporation, 379 Mich 605, 612 (1967)(emphasis added). It also appeared that loss of industrial use claims for T & P benefits were no longer viable.

The Legislature also added the conclusive presumption that a claimant was totally and permanently disabled for the number of weeks listed in the T & P provision. PA 1955, No. 250. This Court explained in Liesinger, 377 Mich 158, 165, fn. 6 (1966), that the effect was that a claimant would now be found to be totally and permanently disabled "without regard to current wage earning capacity, to those injured employees suffering specific losses ....".[2]

However, in 1956 the Legislature added a seventh category, loss of industrial use of two specified members to the total and permanent disability schedule of benefits in MCL §418.361(3). PA 1956, No. 195. Because the Legislature added a category of T & P

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[2] From 1927 to the effective date of this amendment, the employer had been entitled to offsets for any wages a totally and permanently disabled employee earned. See, Hebert v Ford Motor Co., 285 Mich 607 (1938). Accordingly, following the amendment, such offsets were not permitted because they violated the conclusive presumption of disability, in T & P claims. Louagie v Merritt, Chapman & Scott, 482 Mich 274 (1969).

benefits to compensate for loss of industrial use of two members, it presumably approved the concept of claims for loss of industrial use of a single member, since the terms of MCL § 418.361(3)(g) permit specific losses to be added together to receive total and permanent disability benefits. In other words, this act by the Legislature is further support for loss of industrial use as a qualifying event for specific losses. This amendment also demonstrates how the Legislature intended for the provisions of MCL § 418.361(2) and (3) to work together, rather than as isolated provisions standing alone.

Therefore, the idea that scheduled loss benefits, either for one member or for two members (T & P benefits), can only be awarded upon a showing of impairment of wage earning capacity is wrong. The benefits are awarded without regard to the wage earning capacity of the claimant. The legislative changes in 1954 and 1956 ended any argument that wage earning capacity is relevant to an analysis under either MCL § 418.361(2) or (3) and affirmed that loss of industrial use claims could be made under either provision. This Court reaffirmed in Kidd v General Motors Corp., 414 Mich 578, 586, 588 (1982), that unlike general disability cases, the earning of post-injury wages is not relevant in scheduled loss cases, including T & P cases.

B This Court's Prior Holding in This Case Violates The Statutory Presumptions of Disability in Scheduled Losses.

This line of cases and legislative development illustrates the plain error of this Court's prior holding in this case. This Court held that wage earning capacity was relevant in T & P cases for loss of industrial use of two members. This Court apparently ignored the authority just cited, because it did not discuss the statutory presumption or these cases, nor overrule them. This Court should correct this obvious error in its prior decision.

The problems created by this Court's error are illustrated by Waste Management's

argument that if loss of industrial use claims are permitted in specific loss claims, that external aids and devices should be considered. The rationale for doing so, as set forth in this Court's prior opinion, is that external aids and devices are relevant to whether there is any wage earning capacity, and wage earning capacity is relevant in loss of industrial use claims.

Tragically this would push the T & P analysis back to the days prior to the 1954 and 1956 amendments when wage earning capacity was relevant to scheduled loss claims and the analysis was one of fact and not of meeting the statutory definition. It would also inject considerations of wage earning capacity into virtually every subcategory of MCL § 418.361(2) for specific losses, since as shown above, loss of industrial use is a qualifying loss. Even this Court said in its earlier opinion that corrective devices should not be considered in specific loss claims since wage earning capacity was not relevant there, oblivious to the error it had committed and the inevitable contradictions it created.

Waste Management's argument and this Court's error also eliminates the distinction between T & P benefits and general disability benefits (MCL § 418.351(1)). Under general disability benefits, the analysis of disability is one of fact and not presumption and considers any external aids or prosthetics the claimant may be using.

This Court should reject any attempt to circumvent the conclusive statutory presumption of disability set forth in MCL § 418.361(2) or (3) by permitting evidence of the claimant's wage earning ability. Considering external aids and devices in the analysis does just that, and should not be permitted. Accordingly, not only should Waste Management's argument be dismissed, this Court should reverse its own error in its prior decision, which erroneously injected ideas of wage earning capacity into T & P claims for loss of industrial

use, in direct conflict with legislative and judicial history and statutory language.

C This Court's Prior Decision and Waste Management's Arguments Lead to Illogical and Absurd Results.

Because this Court denied Cain benefits under MCL § 418.361(3)(g), for loss of industrial use of two legs, Defendant Waste Management cries foul that the WCAC awarded Cain T & P benefits under MCL § 418.361(3)(b), implying that Cain improperly received benefits in conflict with this Court's earlier decision. Cain argues the real mischief in his case is not that he ended up with benefits under one subsection of the statute and not another, but that Defendant Waste Management is urging unsupported interpretations of the statutory term "loss" that require overturning precedent, legislative history, and standard interpretive definitions, that create internal inconsistencies, and via the back door, reverse essential provisions of the Act such as the presumption of wage loss in scheduled losses and the distinction between scheduled losses and general disability benefits.

By way of further illustration, this Court's prior holding would reject a claim by a double amputee for loss of industrial use of two legs, for example, if the amputee could ambulate using two prosthetic legs and canes. This Court's prior decision also means that the term "loss" in the statute means very different things depending on which subsection it is in. According to this Court, in the single loss provisions of MCL § 418.361(2) it means without corrective devices and without regard to wage earning capacity, as it does in the T & P provisions of MCL § 418.361(3)(b)-(f), but with corrective devices and with regard to wage earning capacity in MCL § 418.361(3)(g), and with corrective devices and without regard to wage earning capacity in MCL § 418.361(3)(a).

However, if mitigating devices are considered in <u>all</u> specific loss and T & P claims, as argued by Waste Management, a double amputee who could ambulate using two

prosthetic legs and a cane would be denied benefits for the loss of two legs, whether by asking for two single losses or by asking for T & P benefits for the loss of both legs, an absurd result noted by the Court of Appeals. Waste Management indignantly denies this would result, but does not explain why not. Further, if "loss" by amputation and "loss " by industrial use are not considered equivalent losses under the statute, a claimant could bring multiple claims for total and permanent disability benefits for the same limbs, the first time for loss of industrial use, and again later if the limbs were subsequently amputated. The WCAC denied such a claim in Newton v Hoskins Manufacturing Co., 1992 ACO #738, only by noting that the two types of losses were equivalent under the statute. (Copy attached in Plaintiff's Appendix).

Of course, one needs look no further than Cain's own case to see absurd results. This Court held that Cain has the industrial use of his legs, even though he only has one leg. Defendant Waste Management has yet to point out any inconsistencies that result from Cain's interpretation of the Act, the interpretation being used at the time of his claim. Simply put, the previous, workable, and consistent prior interpretation of the Act was that a.) single loss claims include claims for loss of industrial use, b.) external aids and devices are not considered in single loss claims or T & P claims because wage earning capacity considerations are irrelevant in either subcategory of scheduled losses, and c.) T & P claims for the loss of two members (under MCL § 418.361(3)(b)) can include a combination of amputation, paralysis, or loss of industrial use claims. The only harm Waste Management can point to is that Cain, at long last, would finally collect the benefits to which he is entitled and which he has fought so long to obtain. That is the true "plain meaning" of Waste Management's argument. This Court should restore the legal standards in place at the time

Cain filed his claim. Defendant-Appellant Waste Management's appeal should be denied.

RELIEF REQUESTED

For the reasons stated above, this Court should deny Defendant-Appellant Waste Management's appeal, correct the erroneous holding in its prior opinion that wage earning capacity and corrective devices are relevant in T & P claims for the loss of industrial use of two members, and decline to overrule Pipe v Leese Tool & Die, 410 Mich 510 (1981).

Respectfully submitted,

PINSKY, SMITH, FAYETTE & HULSWIT, LLP
Attorneys for Plaintiff-Appellee, Scott Cain

Dated: September 1, 2004

By Edward M. Smith/by pkb #45728
Edward M. Smith (P20646)
146 Monroe Center, N.W., Suite 1515
Grand Rapids, MI 49503
(616) 451-8496

Dated: September 1, 2004

By Pamela K Bratt
Pamela K. Bratt (P45728)
146 Monroe Center, N.W., Suite 1515
Grand Rapids, MI 49503
(616) 451-8496